

**KUEH BAK HONG & ORS. v.
POH THIAN SONG & ORS.**[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman F.J. &
Tan Chiaw Tong J.) May 11, 1981]

[Kuching — Federal Court Civil Appeal No. 96 of 1980]

*Practice and Procedure — Claim on partnership —
Money ordered to be paid into court — Application for money
to be deposited in bank to earn interest.*

The appellants had sued the respondents for a declaration that a partnership be dissolved and for an accountant to be appointed to look into the affairs of partnership. The respondents were ordered to pay the sum of \$100,000 into court pending the trial of the action. The respondents paid the money into court. The appellants applied that the money be deposited in a bank to gain interest. The learned Judicial Commissioner who heard the application refused it on the ground that the matter was *sub judice*. The appellants appealed.

Held: the learned Judicial Commissioner had exercised his discretion wrongly and the application should be granted.

FEDERAL COURT.

Chew Pok Oi for the appellants.

Benedict Lim for the respondents.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): We allowed this appeal against the refusal of the learned Judicial Commissioner to make an order for a sum of \$100,000 paid by defendants into Court Deposit to be deposited in a licensed bank in Kuching as a fixed deposit with the view to earning interest for such period as the court may deem fit pending the trial of the action. We stated we would give our reasons. We do so now.

In April 1976 plaintiffs started a partnership business of timber logging contractor under the style of "Meng Kiang Enterprise" at No. 140, Foochow Road, No. 2, Kuching. The 2nd, 3rd, 4th and 5th defendants were the nominees of the 1st defendant. At all material time 1st defendant was the managing partner of the said partnership.

It was alleged that on February 28, 1979 the 1st defendant, without the knowledge or consent of the plaintiffs, ceased the business of the said partnership. From March 1, 1979 onwards 1st defendant by himself carried on the business of timber logging contractor. Plaintiffs asked 1st defendant to render a final account of the partnership. 1st defendant had not done so. Plaintiffs sued defendants and prayed for a declaration that the partnership between the parties known as "Meng Kiang Enterprise" be dissolved on February 28, 1979 and for the appointment of an accountant to look into the affairs of the said partnership up to the date of dissolution.

On September 15, 1979 the defendants were ordered to pay a sum of \$100,000 into Court Deposit pending the trial of the action. On April 7, 1980 the defendants were ordered to comply with the above order within seven days. Defendants paid the sum of \$100,000 into Court Deposit on the following day. The sum paid into Court Deposit is not earning any interest.

By a summons-in-chambers dated July 10, 1980 plaintiffs applied for an order that the sum of \$100,000 paid into Court Deposit by defendants on April 8,

A 1980 be deposited in a licensed bank in Kuching in the name of the Sarawak Government as a fixed deposit to earn interest for such period as the court may deem fit. The interest so earned shall go to the party adjudicated entitled to the sum of \$100,000. The application was supported by an affidavit sworn by Mr. Kueh Bak Hong.

B On July 21, 1980 the summons came up for hearing in chambers before Mr. Y.C. Chiu who was then appointed Judicial Commissioner. Defendants raised no objection to the application. However, the learned Judicial Commissioner refused to grant the order on the ground that the matter was *subjudice*.

C Clearly, the learned Judicial Commissioner misunderstood the true purpose of the application and therefore exercised his discretion wrongly. The application does not in any way affect the issue of the action. Before us the defendants again did not object to the application. There is no question of the matter being *subjudice*. It is in the interest of both parties that the money should earn interest instead of lying idle in Court Deposit as the suit may not come up for hearing for some time. There is no reason for the learned Judicial Commissioner to refuse the application. He ought to grant the order as prayed. Appeal allowed. Costs in the cause. Deposit to be refunded to appellant. Order in terms of the summons dated July 10, 1980.

E

Appeal allowed.

Solicitors: Chan, Jugah, Wan Ullok & Co.;
Michael Ong & David Tiong.

**F KOH KIAN HUAT TEA MERCHANT (PTE) LTD.
v. LIAN SENG HANG TRADING COMPANY**[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman F.J. &
Tan Chiaw Tong J.) May 12, 1981]

[Kuching — Federal Court Civil Appeal No. 215 of 1980]

Practice and Procedure — Judgment against partnership firm — Application to issue execution against former partners of firm — Debt incurred before partnership shares transferred — Summons not served.

G

Partnership — Debt incurred by partnership — Debt incurred before transfer of shares — Judgment against partnership firm — Application to issue execution against former partners of firm.

H The appellant sued the respondent firm for balance of moneys due for price of tea. The appellants obtained judgment against the respondent for the sum of \$21,462.09 with interest. It appeared the partnership originally consisted of seven partners but the other partners transferred their shares to one of them Chin Boon Wei. The writ of summons was served only on Chin Boon Wei and the other partners were not served individually. The appellant applied for leave to issue execution against the other six partners of the firm, alleging that part of the debt was incurred before the transfer of the partnership shares to Chin Boon Wei. Five of the other former partners were served with the summons and the learned judge gave liberty to levy execution against them. The summons against the sixth former partner could not be served and the appellant applied for leave to issue execution against him. The learned Judicial Commissioner who heard the application made an order refusing leave not only in respect of the sixth former partner but also in respect of the other five partners. The appellant appealed.

I

Held: (1) the learned Judicial Commissioner had no

jurisdiction to disturb the order made by the learned judge in respect of the five partners;

(2) as regards the sixth partner the learned Judicial Commissioner could neither grant nor dismiss the application as the summons was not served. What he should have done was to consider whether substituted service could be allowed;

(3) the order of the learned Judicial Commissioner must be set aside with liberty to the appellant to apply further against the sixth partner.

FEDERAL COURT.

Chong Siew Chiang for the appellant.

Respondent absent (served).

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): We allowed the appeal and stated we would give our reasons later. We do so now.

Appellant/plaintiff company sued respondent/defendant firm on March 12, 1979 for \$30,023.09 for balance of price of tea. By a summons-in-chambers dated August 29, 1979 plaintiff applied for leave to enter final judgment against defendant for the sum of \$21,462.09. The application was supported by an affidavit sworn by Leong Hein Joung on August 23, 1979. In reply Chin Boon Wei swore an affidavit dated September 17, 1979 claiming to be the sole proprietor of the defendant firm. By paragraph 8 of his affidavit he admitted that plaintiff was entitled to judgment in the sum of \$18,246.46.

On November 5, 1979 the learned judge gave leave to plaintiff to enter final judgment against defendant in the sum of \$21,462.09 with costs to be taxed. On November 13, 1979 plaintiff obtained judgment against defendant for the sum of \$21,462.09 with interest at 6% per annum from date of judgment until payment and costs to be taxed. By a summons-in-chambers dated February 15, 1980 plaintiff applied for leave to issue execution against six partners of defendant firm. The application was supported by an affidavit sworn by Mr. Shim Pan Chi. It was pointed out that the defendant firm was registered on October 13, 1975 with seven persons named as partners. By virtue of a deed dated March 29, 1978 the partners transferred their shares to Chin Boon Wei. That transfer was only reported to the Registrar on April 3, 1978. The writ of summons was served only on Chin Boon Wei and the other partners were not served individually. As they informed the Registrar of Business Names of their retirement on April 3, 1978 they would be liable to debts incurred by the partnership prior to that date. They are certainly liable to debts prior to transfer to Chin Boon Wei. Paragraph 7 of Mr. Shim's affidavit sets out the dates and the amounts of debts clearly. Paragraph 8 affirms that Chin Boon Wei is liable to \$21,462.09 and the previous partners are liable jointly and severally to the extent of \$13,486.27 which were incurred before the transfer of the partnership shares.

On March 17, 1980 the learned judge granted plaintiff liberty to issue execution against Wee Boon Kuan and Wee Boon Teck who were served with the summons but failed to appear. The other partners were not served. On May 26, 1980 the learned judge made a similar order against Tan Sai Kok, Kiing Teck Yien and Then Chan Tze who were served with sum-

A mons but failed to appear. These were made clear in the order dated May 26, 1980. (See page 23 of the Appeal Record).

On August 18, 1980 Mr. Chong Siew Chiang appeared before Mr. Y.C. Chiu to apply for leave to issue execution against the sixth partner, Tan Hock Seng on whom summons could not be served. A perusal of the notes of proceedings show the following:—

“Mr. Chong for plaintiff.

Summons not served (Tan Hock Seng).

The judgment was entered against the defendant firm of which one Chin Boon Wei was the sole proprietor (see Chin's Affidavit dated September 17, 1979).

C There was no evidence that the 6 persons named in the summons were indebted or liable to the plaintiff (see Chin's Affidavit again (*supra*)).

The solicitors should be able to sort out the mess.

Leave refused.

(Y.C. CHIU)
Judicial Commissioner
18.8.1980.”

D The learned Judicial Commissioner purported to make an order dated August 18, 1980 to the effect that:—

“IT IS ORDERED that the plaintiff's application for leave to issue execution against Wee Boon Kuan, Wee Boon Teck, Tan Sai Kok, Kiing Teck Yien, Than Chiam Kee alias Then Chan Tze and Tan Hock Seng alias Tan Hock Sin be refused.”

E On August 20, 1980 the learned Judicial Commissioner issued a certificate certifying that he did not want to hear further argument. Counsel for plaintiff could hardly believe his eyes hence he wrote on September 3, 1980 to the Assistant Registrar to inquire from the Judicial Commissioner whether the draft correctly reflected the nature of the learned Judicial Commissioner's order made on August 18, 1980. On September 12, 1980 plaintiff gave notice of appeal.

The affidavit of Mr. Shim Pan Chi was clear. No one disputed that Chin Boon Wei was the sole proprietor. Both affidavits were before the learned judge when he granted leave to plaintiff to issue execution against five of the six partners. These five were served with the summons but failed to appear. The sixth was never served. Mr. Chong Siew Chiang applied to the learned Judicial Commissioner for issuance of execution against the sixth partner. Instead, the learned Judicial Commissioner not only refused to grant leave to issue execution against the sixth partner but also purported to refuse leave to the other five partners. In our considered opinion the learned Judicial Commissioner has acted too hastily. He has no jurisdiction to make the order he made which virtually set aside the order made by the learned judge in respect of the five other partners as the matter was not before him. No application was before the learned Judicial Commissioner in respect of the five partners. In dealing with the application of the sixth partner how could he disturb the order made by the learned judge earlier on in respect of the five partners. He has overlooked the affidavit of Mr. Shim Pan Chi. He has no business to disturb the order of the learned judge. He acted as if he was hearing an appeal when there was no appeal before him. Our impression is that the learned Judicial Commissioner has shown

lack of understanding and experience in chambers matters. The usual practice in a case of such nature is to allow an adjournment for substituted service as at least two attempts at personal service have not been successful. The learned Judicial Commissioner could neither grant nor dismiss the application as the summons was not served. To refuse the application when the summons was not even served would mean making a judicial decision before a party is heard. This is contrary to the rules of natural justice and cannot be supported.

Accordingly, we allowed the appeal and set aside the order made by the learned Judicial Commissioner with liberty to appellant to apply further against the sixth partner, if necessary. We made no order as to costs. Deposit to be refunded to appellant.

Appeal allowed.

Solicitors: *Chong Brothers.*

**NG YIT SENG & ANOR. v.
SYARIKAT JIWA MENTAKAB SDN. BHD. & ORS.**

[F.C. (Raja Azlan Shah C.J. (Malaya), Abdul Hamid F.J. & Abdoolcader J.) May 20 & June 5, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 42 of 1980]

Practice and Procedure — Appeal — Appeal record not served on respondents — Application to dismiss the appeal — Federal Court (Civil Appeal) (Transitional) Rules 1963, r. 19(8) — Rules of the Federal Court 1980, rr. 62(9), 163 & 164.

In this case the appellants' claim for specific performance of a contract involving the right to work a timber concession and damages had been dismissed in the High Court. The appellants filed notice of appeal and eventually filed the record of appeal. No copy of the record was however served on the respondents or their solicitors. The respondents took out a motion to dismiss the appeal as the record of appeal had not been served on them or their solicitors.

Held: in this case the appellants had failed to comply with the statutory provision requiring service of the copy of the record of appeal on the respondents or their solicitors and therefore the appeal must be dismissed.

Cases referred to:-

- (1) *Pow Hing & Anor. v. Registrar of Titles Malacca* [1981] 1 M.L.J. 155, 157.
- (2) *Scurr & Ors. v. Brisbane City Council & Anor.* (1973) 47 A.L.J.R. 532, 536.
- (3) *Cullimore v. Lyme Regis Corporation* [1962] 1 Q.B. 718.
- (4) *Coney v. Choyce* [1975] 1 W.L.R. 422, 434.
- (5) *Regina v. Croydon Justices, ex parte Lefore Holdings Ltd.* [1981] 1 All E.R. 520; [1980] 1 W.L.R. 1465.

FEDERAL COURT CIVIL APPEAL.

J.G. Bernatt for the appellants.

C.C. Aiyathurai for the respondents.

Cur. Adv. Vult.

Abdoolcader J. (delivering the judgment of the Court): The appellants' claim as plaintiffs in the substantive proceedings for specific performance by the 1st respondent of a contract involving the right to work a timber concession in Pahang and for damages against all the respondents jointly and severally was dismissed by Syed Othman F.J. (sitting as a judge of the High Court) on January 26, 1980. A notice of

- A** appeal against that decision was filed on February 25, 1980 and served on the respondents, solicitors on the same day. The appeal was entered accordingly by the federal registry and given its designated number and the record of appeal was required to be filed on or before April 7, 1980. A draft index for the record was served on the respondents' solicitors on April 2, 1980 and the record itself was filed in the registry on April 5, 1980 but apparently no copy thereof was served on the respondents or their solicitors as they allege as required by the provisions of rule 19(8) of the Federal Court (Civil Appeals) (Transitional) Rules, 1963 which provide that the appellant shall at the time of filing the record serve a copy thereof on each party who has been served with the notice of appeal.
- C** The equivalent provision now operative is rule 62(9) of the Rules of the Federal Court, 1980 ('the 1980 Rules') which came into force on June 1, 1980. The appeal was set down for hearing at the sitting of this Court commencing May 19, 1981 but on May 4, 1981 the respondents took out a motion to dismiss the appeal as the record of appeal had not been served on them or their solicitors in compliance with the rules even up to the date when the motion was filed.

The affidavit in support of the motion to dismiss the appeal disclosed that the appeal had in fact first been fixed for hearing on January 12, 1981 but was taken out of the list for that sitting at the request of the appellants' solicitors. On March 4, 1981 the respondents' solicitors wrote to the appellants' solicitors stating that they had not been served with the record of appeal in compliance with the requisite provision of the relevant rules and requesting that either the record be sent to them as soon as possible under A.R. registered cover or that an appointment be given for them to collect the record at the appellants' solicitors' office. The response to this was a carbon copy to them of a letter dated March 9, 1981 from the appellants' solicitors to the 1st appellant enclosing a copy of the respondents' solicitors' letter of March 4, referring to the fact that the 2nd appellant was to have served a copy of the record on the respondents' solicitors and that the appellants' solicitors had been informed by the 1st appellant that this had been done and asking for 'fresh instructions or else it might be too late', whatever that means.

- F** It then appears that the 1st appellant in an affidavit made in connection with a summons in chambers in the High Court action which was wholly unrelated to the question of service of the record of appeal affirmed that he did himself serve the record on the respondents' solicitors on April 7, 1980. The respondents' solicitors took cognizance of this averment notwithstanding the fact that it was made in a wholly unrelated context and process and wrote to the appellants' solicitors on March 29, 1981 referring thereto and stating that all documents received by them by way of service would always have their acknowledgment with the stamp of the firm, the date of service and the signature of the person in the firm accepting service and requesting proof of service of the record of appeal within 14 days. There was no response whatsoever to the eminently reasonable request made in this letter.
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- I**

On May 14, 1981, just 5 days before the respon-